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No. 92-419

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ADMINISTRATOR OF THE NEW YORK CITY DEPARTMENT OF HUMAN RESOURCES, *et al.*,

Petitioners,

VS.

ABBOTT HOUSE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Question Presented

Where Intervenors prevailed on the merits in vindicating the constitutional rights of the 4,600 children entrusted to their care, must they be denied counsel fees solely because they asserted no violation of their own corporate rights?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, (hereafter "Intervenors"), 19 not-for-profit child care agencies who prevailed in vindicating the constitutional rights of 4,600 children in their care, respectfully urge the Court to deny the petition for a writ of certiorari for the reasons stated below.

RESTATEMENT OF THE CASE

The Petition misstates the case by both commission and omission. Hence we restate it here.

Petitioner (hereafter the "City") seeks a writ of certiorari to review an order of the Court of Appeals holding respondents entitled to counsel fees but remanding the case to the District Court to recompute the fees to be allowed.

In 1973, plaintiffs' sued not only the City and religiously affiliated child care agencies, but also virtually every child care agency in the City of New York, including many of the Intervenors.

Since none of those Intervenors discriminated (JA 183-184),[1] they were dismissed as defendants in 1974. However, the judgments of dismissal reserved to some of them full party status on any relief that might be granted (A-8) — a fact omitted from the Petition. They were hardly "volunteers." See Petition, p. 13.

Ten years later, when those Intervenors obtained a copy of the settlement negotiated exclusively by the City and plaintiffs, they found it seriously deficient. At the suggestion of the District Court, they conferred with the City and plaintiffs to seek modifications of the proposed settlement to protect the rights of the children in their care. However, the City and plaintiffs flatly refused to change the settlement in any respect (A-8, JA 302, W 1851-1853).

Thus, those Intervenors, joined by others who had reserved no rights or did not exist in 1973, had no choice but to intervene under Rule 24 and file objections, since their deep concerns for the rights of the children in their care would otherwise be ignored by the existing parties (JA 152-153).

These Intervenors stand in *loco parentis* to the 4,600 children in their care (A-18), constituting 25% of the children then in the City's foster care system (A-8). Intervenors shelter, evaluate, plan for, supervise, educate, treat medically, psychiatrically and

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[1] References to "A" are to Petitioners appendix; "JA" to the appendix in the Court of Appeals on this appeal and "W" to the appendix on the prior appeal which confirmed the final Stipulation of Settlement.

mentally, and nourish the children entrusted to their care, whose parents cannot do so (W 1643-1849). These children included large numbers within and large numbers outside the plaintiff class (W 1647, 1715-16, 1728, 1735-6, 1740-1, 1749, 1755-6, 1766-7, 1781, 1797-8, 1828).

It was Intervenors who proceeded to make a record and advance arguments that the rights of the children in their custody and care required that the proposed stipulation be rejected. (JA 303-4) To that end, Intervenors filed 21 affidavits totalling 250 pages (W 1645-1900), 13 pages of formal objections and 62 pages of briefs and exhibits (JA 18-94).

Ultimately the District Court so found, holding that the proposed stipulation was "unacceptable on several levels" in light of Intervenors' objections, *Wilder* v. *Bernstein*, 645 F. Supp. 1292 at 1347 (S.D.N.Y. 1986), *aff'd* 848 F.2d 1338 (2d Cir. 1988), a finding omitted from the Petition here.

Only when faced with the record compiled by Intervenors did the City and plaintiffs recognize that Intervenors had raised substantial issues of the unconstitutionality of the proposed stipulation and its serious adverse effect on children's rights.

Lengthy negotiations then followed. As the District Court found in approving the final settlement:

> "It was around [Intervenors'] concrete proposals that all the parties subsequently negotiated, in open court, during lengthy sessions held through the fall of 1984" (645 F. Supp. at 1348).

The District Court found that Intervenor's succeeded in obtaining numerous substantial changes in the proposed stipulation (645 F. Supp. at 1348-1349; 725 F. Supp. at 1329, n.4, A-52). Indeed, Intervenor's assent to the final Stipulation as modified to meet virtually all of their objections was a weighty factor in the District Court's decision to approve it (645 F. Supp. at 1350) – another critical fact omitted from the Petition.

The City attempts to distinguish between the constitutional points raised by Intervenors and their "clinical concerns." However, Intervenors, and only Intervenors, successfully argued that the so called "clinical concerns" raised by Intervenors demonstrated that the settlement agreement proposed by the City and plaintiffs was adverse to the best interests of children in care and thus violated their rights under the 14th Amendment.

As the Intervenors contended before the District Court in August 1984:

> "The City and ACLU say the core issues in this case are equal access to care and religious issues. We disagree with that.
>
> "We think that in any case dealing with children and care the best interests of the child, each individual child, is the lodestar by which the Court and all the parties must be guided. . . When parents are unwilling or unable to take care of their children, the state, and by that I mean the state generically, here the City — can only step in and act as the parens patriae in the best interests of the child. That is the beginning, the end, and the middle. JA 179
>
> * * *
>
> "He is coming into care because the state must take care of him. The state can only act in the child's best interests. Your Honor put his finger on our constitutional argument, that the equal protection rights of the child were being violated. . . *Nobody addressed that issue except us.*
>
> "*It is the child's 14th Amendment rights that are being violated.*" JA 185. (Emphasis added).

In the end, the District Court made the following findings which were uncontested in the Court below and unchallenged here:

(1) "[T]he Court found the contributions made by the Intervenors were essential to the creation of the final Stipulation" 725 F. Supp. at 1329, A-51.

(2) Intervenors prevailed "in forestalling entry of the proposed stipulation negotiated by plaintiffs and the City" 725 F. Supp. at 1329, A-52.

(3) Intervenors "prevailed, through negotiations, in their proposals to modify the settlement to ameliorate the constitutional, clinical, and practical stumbling blocks they had identified in the original stipulation." 725 F. Supp. at 1329 (footnote omitted), A-52. "They succeeded in obtaining modifications in the initial settlement proposal on virtually every objection they raised." 725 F. Supp. at 1332, A-58.

(4) Intervenors "furthered the purposes of the civil rights statutes by facilitating the formation of a settlement which would safeguard the constitutional rights of the children in the City's care, while assuring that the child care system itself would remain focused on the overall best interests of the children entitled to the protection of the civil rights laws." 725 F. Supp. at 1331, A-57-8.

(5) Intervenors "consistently and forcefully articulated objections addressed to the constitutional and civil rights issues in this litigation." 725 F. Supp. at 1332, A-58

(6) Intervenors "helped to vindicate the civil rights of the children and families in the foster care system which they served, not just their own self interests." *Id.*

(7) Intervenors achieved "a 'material alteration of the legal relationship of the parties in a manner which Congress sought to promote'." *Id.* (citations omitted).

(8) "The contributions made by the intervenors were essential to the creation of a just and workable remedy, exactly the type of activity sought to be promoted by the civil rights statutes." 725 F. Supp. at 1331-2, A-58.

Finally, the City states that Intervenors had no legal interest at stake in the litigation, because "they had no axes to grind," were interested only in "the best interests of children in foster care" and they were "non-parties vis-a-vis the underlying constitutional claims in the lawsuit." Petition at p.4.

Intervenors, of course, had no axe to grind as to the underlying claims of racial and religious discrimination. With respect to relief, however, Intervenors had enormous axes to grind. *See* findings 1-8, *supra*. Intervenors also argued that the proposed settlement agreement violated the First Amendment rights of the children and their parents, (JA 23, 70-76, 133-36, 302-3, 308-9) as well as the Fourteenth Amendment rights of the children.[2]

Intervenors' stake in the litigation was to protect the constitutional rights of the 4600 children in their care, and for whom they stand in *loco parentis*, when threatened by the settlement originally put forward by plaintiffs and the City.

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[2] Footnotes 2 and 7 to the Petition disingenuously suggest that the City's payments to plaintiffs by agreement somehow impact Intervenor's right to fees for their critical contributions. Omitted are the facts that the District Court expressly found that the City did not pay plaintiffs for litigating against intervenors (725 F. Supp. at 1332, note 8, misprinted at A-58) and that Intervenors stipulated in open Court to seek no fees for enforcement activities short of actual litigation. In any event, this case has been remanded to the District Court to insure that there will be no duplication of fees. See p. 13 *infra*.

REASONS FOR DENYING THE WRIT

POINT I

THIS CASE RAISES NEITHER NEW ISSUES NOR SIGNIFICANT ISSUES

Here, the unchallenged findings of the District Court (p. 4-6, *supra*) demonstrate beyond cavil that Intervenors contribution was not only significant but pivotal to the outcome and altered the legal relationship of the parties in numerous and critical respects.

The decision below simply holds that an Intervenor who so vindicates the constitutional rights of those for whom it stands in *loco parentis* is entitled to fees for so much of that work as is non-duplicative of plaintiff.

Nothing in that holding is either new or a departure from prior law:

A. Once intervenors demonstrate a significant contribution by non-duplicative work, *Donnell* v. *United States*, 682 F.2d 240, 249 (D.C. Cir., 1982) *cert. denied*, 459 U.S. 1204 (1983), that resulted in a "material alteration of the legal relationship of the parties" *Texas State Teachers Assoc.* v. *Garland Independent School District*, 489 U.S. 782, 792-793 (1989), their right to counsel fees is assured. There is not a single case, and certainly none is cited by the City, where an intervenor whose independent activity prevailed in vindicating the rights of its clients or constituents was denied counsel fees.[3]

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[3] *Independent Federation of Flight Attendants* v. *Zipes*, 491 U.S. 754 (1989), relied upon by the City is utterly inapposite. It merely holds that an unsuccessful but blameless intervenor-defendant who violated no rights of plaintiff may not be compelled to pay legal fees to plaintiff when the intervention was not frivolous. Having violated no rights of plaintiffs, there was no liability for fees. Here, of course, Intervenors prevented the City from violating the rights of the children in Intervenors' care. (In *Rhodes* v. *Stewart*, 488 U.S. 1 (1988), the case was moot before judgment on the merits; in *Hewitt* v. *Helms*, 482 U.S. 755 (1987), the fee seeker lost on the merits; and *Kay* v. *Ehrler*, ___ U.S. ___, 111 S.Ct. 1435 (1991) merely held that a *pro se* litigant was ineligible for fees.)

B. The legislative history makes clear that Intervenors who vindicate constitutional rights may be awarded counsel fees (S. Rep. No. 1011, 94th Cong., 2d Sess. 4, *reprinted in* 1976 US Code Cong. & Admin. News 5908, 5912, n.4).

C. The Courts of Appeals have uniformly so held; *United States* v. *Board of Education of Waterbury*, 605 F.2d 573 (2d Cir 1979); *Morgan* v. *McDonough*, 511 F. Supp. 408 (D. Mass. 1981) *aff'd* 689 F.2d 265 (1st Cir. 1982); *Seattle School District No. 1* v. *State of Washington*, 633 F.2d 1338 (9th Cir. 1980), *aff'd* 458 U.S. 457 (1982).

In each of these cases the Intervenors to whom fees were awarded, like Intervenors here, asserted no organizational rights of their own, but rather the rights of their constituents.

The *Waterbury* Intervenors included many persons who had no children affected by the outcome.

The *Morgan* Intervenors were a committee to protect the rights of their clients, a group of public school students.

The *Seattle* Intervenors were even further removed from the children whose rights they advocated, being a group of disparate organizations some of whose members or constituents had children in the plaintiff school systems. Petitioner's attempt to distinguish *Seattle* in footnote 5 is, at best, a distinction without a difference.

Indeed, the nexus between Intervenors and their children is far closer here. Patently, had the absent parents done as Intervenors did, they would have been entitled to fees. Intervenors here stand in the shoes of the children's parents. A-18. Under New York law, Intervenors are the custodians of children in their care, New York Social Services Law §§ 383, 384, 384-a, 384-b. The New York Courts have repeatedly so held, *Matter of Spence-Chapin Adoption Services* v. *Polk*, 29 N.Y. 2d 196, 202-3 (1971); *Matter of JCCA v. Saunders*, 5 N.Y. 2d 222, 229 (1959).

The City and plaintiffs, the two parties who should have protected the rights of the children in Intervenors' care, had agreed on a settlement that violated their rights under the First and Fourteenth Amendments. Only Intervenors acted to protect those rights.

Intervenors right to fees for doing so stands on at least as firm, if not a better, footing then that of the Intervenors in the above cited cases. In the posture of this case it is indistinguishable from the status of the organization in *Mid-Hudson Legal Services, Inc.* v. *G & U, Inc.*, 578 F.2d 34, 37 (2d Cir 1978). That agency vindicated the rights of the farm-worker clients it was mandated to protect. Here, Intervenors protected the rights of the children they are mandated to protect.

In sum, the decided cases uniformly hold that, where, as here, a party prevails in vindicating the constitutional rights of its clients or constituents, it is entitled to legal fees under 42U.S.C. 1988.

The City contends Intervenors should not be awarded fees because they did not claim the City violated their rights. Petition at 9. What Intervenors claimed was that the City violated the rights of the children for whom they care as substitute parents by agreeing to and offering for court approval the initial flawed settlement. Intervenors prevailed on that claim and the settlement was modified to meet their objections. They are entitled to fees.

Since this case in no way expands the coverage of 42 U.S.C. § 1988, it will not let loose the dogs of litigation as the City prophesies. Petition at p. 10. As the Second Circuit so cogently pointed out, A15-6, Rule 24 of the Federal Rules of Civil Procedure will prevent the parade of horribles the City has dreamed up.

This case is particularly unlikely to stimulate litigation due to the fact that many intervenors had established rights pursuant to judgment to act as parties with respect to remedy. If *Waterbury*, *Seattle* and *Morgan* have not stimulated intervenor litigation over more than a decade, it is untenable to argue that this case will.

The City also argues that Intervenors did not need the incentive of fees to litigate in this case and quotes from the first opinion of the Court of Appeals, Petition at p. 12. That opinion was vacated and the unanimous affirmance of fees to Intervenors points out how essential fee recovery is to organizations whose constituencies are, as here, economically disadvantaged. A 18-19. As Intervenors pointed out in their Petition for Rehearing:

> "There is simply no way Intervenors could or would have paid legal fees for the years of litigation it took to correct the seriously flawed stipulation originally proposed by the City and plaintiff's counsel. Every dollar spent on legal fees would have been diverted from providing services to children in dire need, the only purpose of these agencies. None of these agencies could or would have spent substantial sums on this litigation instead of on child care. Indeed, one of their oft repeated objections to the original stipulation was its diversion of scarce financial resources from direct child care. JA 24, ¶ 12; JA 27, ¶ 22; JA 31, ¶ 40; JA 116, ¶ 2; W 1717, 1778."*

Moreover, the Courts of Appeals have long and unanimously held that:

> "Whether or not an action would have been brought in the absence of section 1988 is irrelevant."

Ackerly Communication v. *City of Salem, Oregon*, 752 F.2d 1394, 1397 (9th Cir. 1985) *cert. denied*, sub. nom. *County of Multinomah* v. *Ackerly Communications*, 472 U.S. 1028 (1985); *Sargeant* v. *Sharp*, 579 F.2d 645, 648 (1st Cir. 1978); *Milwe* v. *Cavouto*, 653 F.2d 80, 83 (2d Cir. 1981); *Gore* v. *Turner*, 563 F.2d 159, 164 (5th Cir. 1978); *Sable Communication of California* v. *Pacific Tel. & Tel.*, 890 F.2d 184, 193 (9th Cir. 1989); *Jones*

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* Citations contained in the quotation have been conformed to n. 1, *supra*.

v. *Wilkinson*, 800 F.2d 989, 991 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987).

More recently, this Court has unanimously reached the same result. *Blanchard* v. *Bergeron*, 489 U.S. 87, 109 S.Ct. at 944 (1989).

POINT II

THERE IS NO CONFLICT AMONG CIRCUITS

As demonstrated in Point I, *supra*, in every case where the issue has been considered, intervenors who prevailed in vindicating the civil rights of clients or constituents have been awarded fees.

The City's attempt to manufacture a conflict among the circuits will not stand even casual scrutiny. *Donnell* v. *United States*, 682 F.2d 240 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983) far from supporting the City, simply makes clear that intervenors, like plaintiffs, who make a substantial contribution are entitled to fees, but when the contribution is minimal no fee should be awarded. *American Booksellers Assoc, Inc.* v. *Hudnut*, 650 F. Supp. 324 (S.D. Ind. 1986) holds only that an intervenor who did virtually nothing is entitled to no fee.

Posada v. *Lamb County, Texas*, 716 F.2d 1066 (5th Cir. 1983) merely applies the *Donnell* reasoning to *plaintiffs* who made no substantial contribution: so much for the supposed greater scrutiny.

The "greater scrutiny" the City trumpets is simply the obvious point that intervenors must satisfy the Court that they did more than ride plaintiffs' coattails. Far from being in conflict with the decision below, *Donnell* emphasizes that intervenors who, like those here, make a divergent or independent contribution are entitled to fees, citing *Seattle*, 682 F.2d at 246 and n.12. The Court below expressly followed the *Donnell* formulation. (A-20)

Least tenable of all is the City's suggestion that the Court below ignored the question of whether Intervenors were plaintiffs or defendants and thus fell into conflict with other Circuits. (Petition p. 15).

In fact the Court below committed no such oversight. It addressed that very question:

> "[T]here is no reason why the present intervenors, whether they be styled intervenor-plaintiffs or intervenor-defendants, may not be prevailing parties for purposes of § 1988 (A-14).

Moreover, Intervenors made clear from the outset that they were neither plaintiffs nor defendants, insisting that they were "Non-Defendant Agencies" (JA 19, 33, 98, 179), who intervened solely with respect to relief. Not having discriminated, they clearly were not defendants. Similarly, they could not style themselves as plaintiffs since they were not involved in the issue of whether discrimination existed. Thus, perforce, they were Intervenors without sub-title. That circumstance does not affect their rights.

Finally, the City's assertion that the Fifth and Eleventh Circuits deemed the plaintiff or defendant label determinative (Petition p. 15) borders on the captious: *League of Unified Latin American Citizens* v. *Clements*, 923 F.2d 365 (5th Cir. 1991) turned not on any distinction between intervenor-plaintiffs and intervenor-defendants, but simply holds that a prevailing intervenor-defendant cannot recover against her equally prevailing named co-defendant. Similarly, *Reeves* v. *Harrell*, 791 F.2d 1481 (11th Cir. 1986) merely holds that an intervenor-plaintiff whose claim is frivolous is liable for fees to plaintiff — in the same way as an intervenor-defendant whose claim is frivolous, *see Independent Federation of Flight Attendants* v. *Zipes*, 491 U.S. at 760 (1989). If the claim is frivolous, liability follows regardless of label.

The labels of "plaintiff" or "defendant" control little when applied to intervenors. On this the circuits are unanimous. *Donnell* held that if intervenor-defendants contributed substantially they were entitled to fees. *Waterbury*, *Seattle* and *Morgan* held the same as to intervenor-plaintiffs.

POINT III

THE STANDARD SET BY THE COURT BELOW IS WORKABLE

In directing the District Court to determine the extent, if any, to which Intervenors work included efforts duplicative of plaintiffs, or was "attributable solely to advancing concerns other than civil rights violations" (A-22), the Court of Appeals created no unworkable standard. The separation of work addressed solely to non-civil rights concerns is akin to excluding "hours that were not 'reasonably expended,' " *Hensley* v. *Eckerhart*, 461 U.S. 424, 434-5 (1983), or determining the hours to be excluded to account for limited success, *Hensley* v. *Eckerhart*, *supra* at 436-7; *Texas State Teachers* v. *Gurland Independent School District*, 489 U.S. at 791 (1989).

Contrary to the City's claim (Petition, p.17), the Court of Appeals did not direct the District Court to make any decision based on Intervenors' motives. Quite the opposite, it held that where mixed motives exist, a prevailing intervenor may be compensated for efforts which advanced civil rights concerns (A-21).

In fact, the decision below, far from conflicting with *Texas State*, follows its directions in the analogous situation of a partially successful claimant. The District Court was instructed: 1) efforts in pursuit of civil rights remedies may be recovered; 2) efforts which furthered civil rights objections together with other concerns may be recovered; and in conclusion; 3) efforts duplicative of plaintiffs' or solely to advance non-civil rights concerns are not recoverable (A-21, 22).

There is nothing unusually complex, arcane or unworkable in that disposition. The District Court was left free to "exercise [its] equitable discretion . . . to arrive at a reasonable fee award, either by attempting to identify specific hours that should be eliminated or by simply reducing the award to account for" non-compensable efforts, *Texas State Teachers* v. *Garland Independent School District*, *supra* 109 S.Ct. at 1492. A decision which, on this point, so closely follows the direction of this Court is no grounds for granting certiorari.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Dated: September 29, 1992

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